IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 11912/17

In the matter between:

NATASHA DRYDEN	**Applicant**
and	
JULIE HARRISON	**First Respondent**
NIEL MORGAN	**Second Respondent**
KATHERINE RITA MORGAN	**Third Respondent**
ELNA VAN DER WALT N.O	**Fourth Respondent**
THE MASTER OF THE HIGH COURT (WESTERN CAPE, CAPE TOWN)	**Fifth Respondent**

Dates of Hearing : 12 March 2019
Date of Judgment : 20 May 2019

JUDGMENT

NUKU, J:

[1] The Wills Act 7 of 1953 ("*the Wills Act*") prescribes certain formalities in respect of the execution and amendment of a Will. These are set out in subsection 2 (1) of

the Wills Act. Failure to comply with these formalities renders a Will invalid. This, however, is not the end of the matter as section 2 (3) of the Wills Act empowers the Court to order the Master to accept an otherwise invalid Will when satisfied that the said invalid Will was intended by the testator to be his/her last Will. This is such an application.

[2] The applicant, Natasha Dryden, was in a romantic relationship with the late Sean Morgan ("*the deceased*") and became engaged to be married during the middle of 2014. The deceased had two siblings, Julie Harrison and Niel Morgan who are the first and second respondents. The applicant withdrew the application against the first and second respondents after the filing of the answering papers.

[3] The deceased was previously married to the third respondent, which marriage was dissolved by a decree of divorce granted by the High Court of South Africa, Gauteng Provincial Division, Johannesburg on 8 April 2011. The deceased had bequeathed his estate to the third respondent in a Will dated 3 October 2006 ("*the 2006 Will*"). The third respondent oppose the application.

[4] The 2006 Will appointed Standard Executors and Trustees Limited and Standard Bank of South Africa Limited as the executors of the deceased's estate. The deceased died on 14 September 2016 and Standard Trust Limited was appointed as the executor of the deceased's estate. Initially, Standard Trust Limited was represented by Antoinette Martin and by virtue of an order granted by this Court on 13 March 2019, Standard Trust Limited is now represented by Elna Van Der Walt

N.O, the fourth respondent. The fourth respondent has played no active role in this application.

[5] The fifth respondent is the Master of this Court. The applicant seeks an order directing the fifth respondent to accept an email dated 4 January 2016, ("*the disputed Will*") from the deceased to the applicant, as the last Will and Testament of the deceased.

[6] The content of the disputed Will reads:

> "-------- Forwarded message -------
> *From: sean@mvee.co.za*
> *Date: Mon, Jan 4, 2016 at 9h57 AM*
> *Subject: Final will*
> *To: Dryden.natasha@gmail.com, Natasha@mvee.co.za*
>
> *Hi,*
>
> *This serves as my final will and testament.*
>
> *If I die, all my assets and investments go to Natasha Dryden. If Natasha's death precedes mine, the entire estate goes in equal portions to my brother and sister or their children if their deaths proceed (sic) me.*
>
> *My life policies must all g (sic) to Natasha.*
>
> *Sean*"

[7] The applicant, in her founding affidavit, states that she believes the disputed Will "*to reflect Sean's (the deceased's) true intentions and wishes and to be his last Will and Testament.*" Her reasoning is that the subject line of the disputed Will contains the words "*Final will*". She also refers to the fact that she is the named beneficiary in the disputed Will.

[8] In the alternative, the applicant seeks an order in terms of section 2 A of the Wills Act revoking clause 2.1 of the 2006 Will bequeathing the estate of the deceased to the third respondent.

[9] Section 2 (3) of the Wills Act, upon which the applicant relies in respect of the main relief states :

> *"If a court is satisfied that a document or the amendment of a document drafted or executed by a person who has died since the drafting or execution thereof, was intended to be his will or an amendment of his will, the court shall order the Master to accept that document or that document as amended, for the purposes of the Administration of Estates Act, 1965 (Act 66 of 1965), as a will, although it does not comply with all the formalities for the execution or amendment of wills referred to in subsection (1)."*

[10] In ***Van Der Merwe v The Master*** 2010 (6) SA 544 (SCA) at para [15] the Court described the enquiry under section 2 (3) of the Wills Act as follows:

> *"...the first question to be considered is whether the document in question was drafted or executed by the deceased. Following on this is the question whether the deceased intended it to be his last Will...."*

[11] As stated above, the disputed Will is an email from the deceased to the applicant. Regarding the first leg of the enquiry referred to in the ***Van Der Merwe*** case above, the evidence is that the email was received by the applicant from the deceased. The first applicant, who deposed to the answering affidavit did not dispute this but merely stated that:

> *"I have considerable reservations as to the authenticity of the document and its provenance..."*

It is also clear from the answering affidavit that the first respondent accessed the email account of the deceased from which the disputed Will was sent and found that in fact the disputed Will was emailed from the email account of the deceased to the applicant. I am therefore prepared to accept that the disputed Will was drafted by the deceased.

[12] The next question that follows is whether the deceased intended the disputed Will to be his Last Will and Testament. One must caution that this enquiry is not primarily focused on the intentions of the deceased regarding the distribution of his estate, but rather that regard must be had to the document which the Court is being asked to order the Master to accept.

[13] The applicant's explanation as to how the disputed Will came about was that the deceased was assisting the first respondent with some disputes in respect of the estate of the first respondent's mother-in-law. The deceased informed her that he did not wish for such disputes to arise in the event of his death, and that he wanted the applicant to be the sole beneficiary of his estate. The following day, 4 January 2016, the applicant received the disputed Will from the deceased.

[14] On 13 January 2016, the applicant emailed the financial advisor of the deceased, Johan Blaauw Financial Services enquiring whether the disputed Will:

> "*will serve as a formal Will infront (sic) of a court in the unlikely event that he were to die?*"

The financial advisor responded on the same day and in the process copied the deceased on the email, advising that:

"I'm not an expert but I think it would need more information regarding – especially – ID numbers, full names etc of beneficiaries. Is he not in a position to sign any documents. An email can always be contested as anyone could have signed it."

[15] It is clear from paragraph [14] above, that both the deceased and the applicant became aware, at least, on the 13th January 2016, that there could potentially be disputes regarding the validity of the disputed Will. In fact, the applicant followed up on this by sending an email to the deceased on the same day. The subject line of the email contains the words "*Actions*" and she lists the following items requiring action by the deceased as:

(1) Banking information and contacts;

(2) List of assets;

(3) List of life policies;

(4) Medical info;

(5) Short term insurance details;

(6) Will.

[16] It appears from the papers that what drove the deceased to send the disputed email to the applicant was his concern that there should be no disputes regarding his estate in the event of his death. The evidence is that he was not only an accountant but a very meticulous person. Also, the deceased had previously executed a Will which complied with all the formalities required in terms of section 2 (1) of the Wills Act. This renders it improbable that he would have intended the disputed Will to be his Last Will and Testament.

[17] Whilst he may have intended to ultimately make the applicant a beneficiary of his estate, he never got to drafting or executing a document which he intended to be his Last Will and Testament. The disputed Will, in my view, is nothing more than an email in which he was assuring the applicant that he will make her a beneficiary of his estate.

[18] The applicant has placed great reliance in the ***Van Der Merwe*** case. In my view, it is distinguishable, in that in the said case a document quite capable of being signed by the deceased as well as the witnesses, was prepared by the deceased and the only omission was, that he never got to sign it together with the witnesses. *In casu,* the document we are dealing with was not prepared as a document intended to be signed by the deceased and the witness. As has been said above, section 2 (3) of the Wills Act is concerned with the lack of formalities in a document that may have been intended to be a Will. It is not intended for the Court to make a Will for the deceased based on what his intentions may have been as was stated in ***Ex Parte Maurice*** 1995 (2) SA 713 (C) at 716 F-G:

> *"... to treat a document which simply reflects or expresses the testator's disposition intention as his will negates the need for testamentary formalities and allows any expression of intention to be treated as a will. The continued retention by the Legislature of the formal requirements for the validity of a will in s 2 (1) of the Wills Act is inconsistent with the adoption of any alternative interpretation of s 2 (3)."*

In my view, the application should fail.

[19] The applicant was late in filing her replying papers. Her explanation was woefully inadequate. For completeness, I am however, prepared to grant condonation for the lateness of the filing of the replying papers on the basis that the applicant is to pay the costs of the application for condonation.

[20] The third respondent has been successful and, in my view, the costs should follow the result.

[21] In the result I make the following order:

> The application is dismissed with costs, including the costs occasioned by the application for condonation for the late filing of the replying affidavit.

Judge L.G. Nuku